



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/765,423	01/27/2004	Brian David Hofrichter	9150	1531
27752	7590	09/01/2010	EXAMINER	
THE PROCTER & GAMBLE COMPANY			DOUYON, LORNA M	
Global Legal Department - IP				
Sycamore Building - 4th Floor			ART UNIT	PAPER NUMBER
299 East Sixth Street				1796
CINCINNATI, OH 45202				
			MAIL DATE	DELIVERY MODE
			09/01/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BRIAN DAVID HOFRICHTER
and MICHAEL FREDERICK NIEBAUER

Appeal 2009-013538
Application 10/765,423
Technology Center 1700

Before ADRIENE LEPIANE HANLON, CHARLES F. WARREN, and
CATHERINE Q. TIMM, *Administrative Patent Judges*.

HANLON, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

A. STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134 from an Examiner's decision finally rejecting claims 1, 3-16, and 20, all of the pending claims.² We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

The subject matter on appeal is directed to a personal cleansing composition comprising a mixture of spherical particles and irregularly shaped particles. The Appellants disclose that the irregularly shaped particles deliver benefits, such as hair volume and fullness, and the spherical particles deliver benefits, such as improved conditioning and combing.

Spec. 1:12-16. Claim 1, reproduced below, is illustrative.

1. A personal cleansing composition comprising:
 - a) from about 5 to about 50 weight percent of a detergents surfactant,
 - b) from at least about 0.1 weight percent of irregularly shaped particles having a particle size of at least 0.01 micron,
 - c) from at least about 0.1 weight percent of spherical particles having a particle size of at least 0.01 micron,
 - d) from about 20 weight percent of an aqueous carrier, and
 - e) a cationic polymer,
wherein the median particle size of said spherical particle is greater than the median particle size of said irregularly shaped particle.

Br., Claims Appendix (emphasis added).³

² Claims 17-19 have been cancelled. See Office communication dated June 19, 2009.

³ Appeal Brief dated August 1, 2007.

The only Examiner's rejection before us on appeal is the rejection of claims 1, 3-16, and 20 under 35 U.S.C. § 103(a) as unpatentable over Fowler (US 5,534,265, issued July 9, 1996).

B. ISSUE

Fowler discloses personal care compositions that are useful for cleansing the skin and hair. Fowler 1:7-9. There is no dispute that Fowler discloses or suggests that the cleansing composition comprises a detergentsurfactant, an aqueous carrier, and a cationic polymer in amounts as recited in claim 1. There is also no dispute that Fowler discloses or suggests that the cleansing composition comprises insoluble particles in amounts and sizes that overlap the ranges recited in claim 1. Ans. 3⁴; Fowler 3:10-14, 44-50.

The Examiner found, and the Appellants do not dispute, that the particles disclosed in Fowler include spherical and irregularly shaped particles. Fowler 4:18-41; Ans. 6-7 (polyethylene and nylon correspond to the spherical particles and alumina, aluminum oxide, iron oxide, silica, and tin oxide correspond to the irregularly shaped particles); *see also* Ans. 8 (“Appellants did not dispute that the personal cleansing composition of Fowler uses both irregularly shaped particles and spherical particles.”). The Examiner also found, and the Appellants do not dispute, that mixtures of particles may be used. Ans. 6; Fowler 4:18-41. Finally, there is no dispute that Fowler discloses a cleansing composition comprising a mixture of particles having different mean particle size diameters. Ans. 7; Fowler 21:35-55.

The only dispute in this appeal is whether the teachings of Fowler render obvious the size distribution of spherical and irregularly shaped

⁴ Examiner's Answer dated October 26, 2007.

particles recited in claim 1, i.e., “wherein the median particle size of said spherical particle is greater than the median particle size of said irregularly shaped particle.” Ans. 3-4; Br. 4-5.

C. DISCUSSION

The Examiner concluded that it would have been obvious to one of ordinary skill in the art “to have optimized the median particle sizes of the spherical particles and the irregularly shaped particles because Fowler teaches in col. 4, lines 15-17 that particles having a wide range of shapes can be utilized.” Ans. 4; *see also* Ans. 7.

The Appellants recognize that Fowler provides motivation to modify particle size for the purpose of optimizing cleansing performance. Br. 4. However, the Appellants argue that Fowler does not provide motivation to optimize particle proportions “because Fowler fails to teach or suggest any correlation between particle proportion optimization and *any* benefit whatsoever.” Br. 5 (emphasis in original).

The Appellants’ argument is not persuasive of reversible error. As discussed above, there is no dispute that Fowler discloses or suggests a cleansing composition comprising a mixture of spherical and irregularly shaped particles. When the size of the spherical particles in such a mixture is optimized for cleansing performance, one of the following three possibilities results: (1) the median size of the spherical and irregularly shaped particles is the same, (2) the median size of the spherical particles is larger than the median size of the irregularly shaped particles, or (3) the median size of the spherical particles is smaller than the median size of the irregularly shaped particles.

Thus, the preponderance of the evidence supports the Examiner's conclusion that a cleansing composition having a particle size distribution as recited in claim 1 would have been obvious to one of ordinary skill in the art. *Cf. In re Schaumann*, 572 F.2d 312, 316-17 (CCPA 1978) (disclosure of prior art, which embraces a very limited number of components, provides a description of those compounds just as surely as if they were identified in the reference by name); *In re Petering*, 301 F.2d 676, 681 (CCPA 1962) (although prior art does not expressly spell out limited class, one skilled in the art would at once envisage each member of the limited class).

The Appellants also argue that Fowler does not address the problem of improving volume, body, and fullness as taught by the Appellants. Br. 4.

To the extent that the Appellants' cleansing composition improves volume, body, and fullness, the Examiner concluded that the cleansing composition suggested by Fowler would also be expected to improve volume, body, and fullness. *See Ans. 6* (it would have been reasonable to expect the composition of Fowler to exhibit similar properties because similar ingredients have been utilized). The Appellants have failed to direct us to any evidence to the contrary. *See In re Best*, 562 F.2d 1252, 1254-55 (CCPA 1977) (where the claimed and prior art products are substantially identical, the PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of the claimed product).

As a final point, we note that the Appellants do not direct us to any evidence of secondary considerations of non-obviousness, such as unexpected results. Ans. 8.

Appeal 2009-013538
Application 10/765,423

For the reasons set forth above and in the Examiner's Answer dated October 26, 2007, we will affirm the § 103(a) rejection of claims 1, 3-16, and 20.

D. DECISION

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

kmm

THE PROCTER & GAMBLE COMPANY
GLOBAL LEGAL DEPARTMENT - IP
SYCAMORE BUILDING - 4TH FLOOR
299 EAST SIXTH STREET
CINCINNATI, OH 45202